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BOOK REVIEWS

The Nature of the Judicial Process. By Benjamin N. Cardozo. New Haven, Yale University Press, 1921. pp. 180.

This book contains four addresses, delivered before the law school of Yale University in 1921. They set forth the answer of an eminent justice of the highest court of a great state to the question, "What do I do when I decide a case?" Although the book professes to give the results of introspective searchings of the author's spirit, the method is predominantly inductive.

In Nye's *History of the United States* it is said that Indians who saw Columbus' ships approaching exclaimed: "At last we are discovered!" Judges of a certain type of mind may feel some dismay at the frank account of this voyage of discovery, and some of them may be inclined to put on war paint. To change the figure, the high priest has not merely come out on the porch of the temple to speak to the people, he has taken them inside, and drawn back the veil. This is as it should be. The judicial process must finally be made to justify itself to those whom it serves, and that end cannot be measurably attained until the curtains of consecration are taken down, the sacred garments of mystery and use and wont are stripped off, and the smallest detail of the process is laid bare for profane inspection and appraisal.

In a sense, there is nothing new in the book but its method. Elements of the judicial process have been discussed before; but this account, although brief, is vivid and complete; although daring, is not sensational or exaggerated; although informed by genius and erudition, is lucid enough to be comprehended by law-school students; and the account is rendered with a combination of spirit and restraint, with that "animated moderation," which makes it as brilliant as it is convincing.

Primarily, the judicial process is search for the rule of law which governs the case under decision. The author does not define the many-phased term "law," but quotes in a footnote the definition of Professor Beale (*Conflict of Laws*, page 133). Definitions which virtually deny the possibility of rules of general operation are rejected, the objective reality of such rules is maintained, and attributes of law, including the exercise of compulsion, are described. Growth of the various notions of law is incidentally revealed, from the conception of a stock of immutable, preordained principles, held when all things were regarded as static, to the prevailing pragmatic conception now entertained, when all things, including the decisions of courts, are known to be dynamic; and the relation between law and life is expressed in the following telling sentences: "Life casts the molds of conduct, which will some day become fixed as law. Law preserves the molds which have taken form and shape from life."

In the great majority of cases, the rule of law and its application are plain. A constitutional provision, or a provision of a constitutional statute, the meaning of which is perfectly clear, may govern, and the search is ended. In the absence of constitution or statute, the judge must look to the common law, and the search is one for precedent. There may be ancient truth. Some principles are so well established that we no longer examine the grounds on which they rest, any more than we reverify mathematical formulae; and, if discovered precedent be plain, the decision follows as a matter of course.

Constitutions enunciate general principles, which must be worked out and applied to particular conditions. Statutes are notoriously incomplete and ambiguous, and interpretation is demanded. When the judicial search turns to precedent, the trail through the wilderness may be difficult to find, and more difficult to follow. What seems to be good precedent, may prove to be dictum when critically analyzed,

and when, after many comparisons, a precedent is found which fairly matches the case, the principle may need re-examination. We have come to know that the method of the common law is inductive; rules and principles of case law are only working hypotheses; each decision is in the nature of an experiment; and the scientific method requires verification and testing of results whenever a change of conditions occurs.

There comes a time when the primary function of the judicial process is exhausted. It is ascertained that the constitution is silent. The legislature has never considered the subject under examination, and has never entertained any intention respecting it. There is no decisive precedent. There is a gap in the law, an interstitial space, and the parties before the court are clamoring for a decision which shall be the embodiment of justice. In this situation, the judicial process, as it is known in England and America, has not halted. According to what has been called the custom of the constitution, the judge has fashioned the law for the benefit of the litigants before him. He has guessed at what the legislature would have intended if the point had ever been presented to its mind, and has made himself the interpreter for the community of its sense of law, under the circumstances. "Every judge, consulting his own experience, must be conscious at times, when the very exercise of will, directed of set purpose to the furtherance of the common good, determined the form and tendency of a rule, which at that moment took its origin in one creative act."

When the judge decides the case for the parties to the suit, he fashions the law for other parties to other suits. The author says: "Every judgment has generative power. It begets its own image. . . . Once declared, it is a new stock of descent. It is charged with vital power." This tendency the author ascribes to habit. The reviewer would say, imitation,—following Bagehot, and not Tarde; but whatever its psychological basis, the tendency is "one of the living forces of the law," and in making a decision, the judge must regard the direction he is giving to the path of the law.

In determining the directive force of a principle the judicial process employs four methods, which the author calls the method of philosophy, the method of evolution, the method of tradition, and the method of sociology.

The method of philosophy—of logic and analogy—keeps the law consistent with itself, excludes prejudice, favor, and all arbitrariness, insures impartiality, leads to symmetrical development in form and substance, may even gratify the desire for *elegantia juris*, and has its roots in the "constant striving of the mind for a larger and more inclusive unity, in which differences will be reconciled and abnormalities will vanish."

The historical method, or method of evolution, recognizes the fact that some conceptions of law owe their form almost exclusively to history, and cannot be understood except as historical growths. While the author says this is true of most conceptions of law, the illustrations are taken from times which we are disposed to call "ancient," and the importance of the method might have been exemplified further by reference to doctrines of recent origin, whose future course will be guided by their history.

The method of tradition takes account of custom, which the author justly concludes lacks the creative energy which it formerly possessed, and formerly lacked the creative energy attributed to it. Although custom has made new law in modern times, its present-day function consists more in determining how established rules shall be applied.

The fourth method, the method of sociology, takes account of that force which the author regards as the greatest one in our day, the power of social justice. "The final cause of law is the welfare of society. The rule that misses its aim cannot permanently justify its existence. . . . The end which the law serves will

dominate. . . ." That end is the welfare of society. The social welfare includes many concepts—ethical considerations, the good of the collective body, public policy, and all that we understand by the term *mores*, whether formulated in creed or system, or immanent in the common mind, and ultimately, the test of any rule is its social value, its ability to accomplish the end for which it was devised.

The growing dominance of the sociological method is traced in the field of constitutional and statutory interpretation, its liberalizing effect on the common law is shown, and a portion of one chapter of the book is devoted to the subject of adherence to precedent, where the conclusion is reached that, while the rule of adherence ought not to be abandoned altogether, its former rigidity ought to be relaxed. Operation of the four methods is illustrated by reference to American and English decisions, and here, as throughout the book, the text is accompanied by abundant critical apparatus, consisting of references to works of the foremost American and European writers on history and philosophy of the law.

When the group of methods has been completed, the most fascinating phase of the judicial process emerges. The various methods act and re-act upon one another, and how is the judge to know how far to follow logic, what weight to give to history, when to admit custom, when to break with precedent, how to apprehend the *mores*, and in what proportion to combine them in a judgment? These questions suggest the question, "What are the rules for painting a picture?" There are, however, some guiding principles and some acknowledged restraints. A judge may not be an impressionist—let it be hoped, not a cubist; he may not yield to spasmodic sentiment, or have personal opinion; he must seek external, objective standards of morality, justice, and utility, and find them where the legislator finds them, in the great reservoir of social experience, wisdom, and truth—in life itself. In doing this, the judge is not free as the legislator is free. The legislator regulates abstractly. The judge acts concretely, and he acts in acknowledged subordination to the legislature, which is the accredited guardian of the public welfare. Besides these, there are more impalpable restraints—tradition, example of other judges, the collective judgment of the profession, and the attitude of adherence to the pervading spirit of the law. In so far as the judge succeeds, his work will display the quality of true statesmanship.

The final element of the judicial process is the subconscious element. The author does not hold the "lonely mountain peak of mind" theory of the judge in action. Beneath consciousness is the complex of instincts, emotions, habits, prejudices, and convictions which make him what he is, and "no effort or revolution of the mind will overthrow utterly and at all times the empire of these subconscious loyalties." These subconscious loyalties, as part of the total push and pull of the cosmos, may determine the decision.

At the beginning of the book, judge-made law is accepted as one of the realities of life. The major portion of one chapter is devoted to a discussion of "The Judge as Legislator," and the entire book is a commentary on that subject, since the judicial process is almost mechanical until the creative faculty is called into play. The method of "free decision," contended for by some writers, and the notion of "*arbitrium boni viri*," are of course rejected; but within the confining walls of the narrow interstitial spaces in the law, and subject to the pressure of rules which hedge him about on every side, the judge does innovate, and must innovate. This method of formulating law is neither new nor revolutionary. It has been the method of the common law for centuries. It was the method of the great chancellors and the method of "the great masters," "Mansfield and Marshall and Kent and Holmes." The subject matter of jurisprudence is plastic and malleable, and not preordained and constant, as men have been accustomed to believe. Partition of the powers of government is a working hypothesis. Those powers cannot be confined in separate, rigid containers. The judicial function of originating rules

to meet the imperious demands of new conditions persists and flourishes, because of the human need to which it responds, and no system of *jus scriptum* has been able to escape or satisfy that need.

The author warns against the conclusion that segregating elements of the judicial process and rendering them distinct, either enlarges their scope or magnifies their importance; and to those who may feel, after reading the book, that the judicial process does not lead to certainty, the author modestly suggests it is not his fault.

The subject of the book is presented in such graceful yet dignified manner, and with such plenitude of learning and felicity of expression, that a summary robs it of its force and its charm. Therefore the present writer recommends that the book be read, not only by judges and lawyers, but by all who take an interest in public affairs, since the book must be reckoned with.

The first inquiry must be, not do we like it, but is the book true? To this question there seems but one answer. It is true; and the proof is furnished by the American judiciary, notwithstanding the fact that some of them, according to our custom, may file dissenting opinions. It will be distasteful to those who are in the habit of taking refuge in such nebulosities as "a government of laws and not of men," to those who have not learned that truth and justice are not fixed quantities, independent of change and growth, and to those who cannot free themselves from the shackles of the old speculative method. Statesmen and judges still delve into inner consciousness and, starting with some irrefragable postulate, deduce all the facts of nature and of life, and upon the facts so derived, declare rules of right conduct. When we attempt to reach the general public and inculcate a clear understanding of matters which must be understood before there can be tranquillity under the existing system or intelligent reform, we meet the same difficulties which the sociological method has encountered and still encounters in establishing its supremacy. At one extreme are selfish interests, obstructionists, conservatives, and reactionists; at the other extreme are fervid sentimentalists, impractical enthusiasts, and violent reformers, who will brook no delay in acceptance of their schemes. The demagogue and the political axe-grinder are not silent. Public opinion itself is inconstant, and deserts a theory with the same ease and celerity with which the theory was embraced. Sometimes public sentiment is created through the bearing of false witness. Sometimes public sentiment is morally wrong. Avoiding modern instances, on a fateful July morning Alexander Hamilton went upon the field of Weehawken, stood up there, and permitted himself to be shot to death, in obedience to an unwritten law supported by public sentiment. Under these circumstances, our hope must be that the seed of the book may fall upon as many fertile places as possible.

The reviewer is inclined to think that the conscious, purposeful projection of the path of the law is somewhat overstressed. That there is effective judicial purpose is manifest, but man takes himself too seriously as lord of creation. The silent forces which made him and made the various forms of his social organizations, have been potent in making his laws. As Emerson said, we do what we must, and call it by the best names. In Bagehot's phrase, "Something seems to steal over society" (*Physics and Politics*, page 87), and, considered from age to age, the progress of the law has been directed by forces quite independent of the judge's will, and which continually contradict and confound him.

The author's views respecting interpretation are entirely sound. Interpretation there must be as long as we have written or printed words to comprehend, whether in Bible or other book, in private letter, in legal document, in statute, in constitution, or in international treaty. The power to interpret must be available for immediate and constant exercise in the decision of controversies, and must be lodged in the courts if they are to fulfill their function. Courts are no more

responsible for existence of this need than physicians and surgeons and hospitals and nurses are responsible for the existence of disease and death in the world.

While the author is wedded to consistency, as already indicated, he may be classed as liberal in disregard of precedent. The reviewer is something more than liberal, and the present is an opportune time to prune the tree of the law of its dead branches.

The reviewer has no quarrel with the term "judge-made law." The mere matter of nomenclature is ordinarily unimportant, so long as the exact facts are understood. However, the term "judicial legislation" and the author's title, "The Judge as Legislator," give no adequate conception of the limitations on the judge's function as formulator of law, and serve to confirm in the common mind truth of the gibe, "the legislature consists of three branches, the senate, the house, and the supreme court." It is probably too late to correct the terminology, but clarity of thought would be promoted if it could be done.

The author completed his task when he fully described the nature of the judicial process. His reference to the Swiss Civil Code of 1907, which authorized the judge, in the absence of statute or customary law, to proceed to judgment according to rules which he would establish if he were to assume the part of legislator, drawing, however, from solutions consecrated by the doctrine of the learned and the jurisprudence of the courts, was made to illustrate the proper attitude of the modern judge toward his task. The question whether it would be feasible and better to send us to the legislature for instruction, was not pertinent to the subject of the book. There is early precedent for such a device in our own legal history. Statute of Treasons, (1350) 25 Edw. III.; 2 Stat. at L. 52. The reviewer has tried to obtain help from the legislature, without much success. On different occasions he has prepared and presented to the legislature bills to fill gaps and remedy defects in the civil and criminal codes, and the bills rarely got beyond the committees to which they were referred. The legislature's attention was occupied with more spectacular affairs.

Let me illustrate the subject of judicial personality as a factor in the decision of causes: In making the play of the Merchant of Venice live on the stage before the eyes of his audience, Henry Irving interpreted Shakespeare's words in such a way that Shylock appeared as having all the superb dignity of a representative of an ancient, noble, and long-oppressed race. In his insistence on the pound of flesh he seemed but an instrument of vengeance in the hands of the offended God of the Hebrew people. Against the appeal to mercy he stood pitiless, implacable, but majestic. When crushed by Portia's law, he seemed turned to stone, and he finally stalked from the stage with a sigh that made the scene one of tragic sadness. Edwin Booth would allow none of this. Reading the same text as Irving, he declared that Shakespeare had created a cruel wretch, filled with revengeful selfishness, incapable of pity and void of mercy, and Booth so portrayed the character.

What would the Constitution of the United States now mean if Jefferson's choice for chief justice, Spencer Roane, had been appointed instead of John Marshall?

ROUSSEAU A. BURCH

Supreme Court of Kansas

American Foreign Trade, as Promoted by the Webb-Pomerene and Edge Acts with Historical References to the Origin and Enforcement of the Anti-Trust Laws. By William F. Notz and Richard S. Harvey. Indianapolis, Bobbs-Merrill Co., 1921. pp. xv, 593.

This book deserves hearty commendation. Treating as it does of the economic history of trade combinations and their regulation by law, it exemplifies the combination of economic and legal points of view in making clear the development